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No. 72-1014

In the Supreme Court of the United States

OCTOBER TERM, 1972

JAMES E. BRADEN, JR.,
Petitioner,

vs.

IRVING M. HERMAN, Director of General Counsel's Office of Appeals, National Labor Relations Board; PETER NASH, General Counsel, NLRB; THOMAS C. HENDRIX, Regional Director, 17th Region, NLRB; HARRY IRWIG, Regional Attorney, 17th Region, NLRB; MAX HOCHANADEL, their agent,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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JAMES E. BRADEN, JR.,
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IRVING M. HERMAN, Director of General Counsel's Office of Appeals, National Labor Relations Board; PETER NASH, General Counsel, NLRB; THOMAS C. HENDRIX, Regional Director, 17th Region, NLRB; HARRY IRWIG, Regional Attorney, 17th Region, NLRB; MAX HOCHANADEL, their agent,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioner, James E. Braden, Jr. (hereafter "Braden"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 24-27) is reported at 468 F.2d 592, 81 LRRM 2457. The decision of the District Court for the Western District of Missouri (App. D, *infra*, pp. 31-33), not officially reported, is unofficially reported at 79 LRRM 2114.

JURISDICTION

The judgment of the Court of Appeals was entered on October 5, 1972 (App. B, pp. 28-29), and Braden's timely petition for rehearing, en banc, was denied on November 1, 1972 (App. C, p. 30). This petition for certiorari was filed within ninety (90) days of the latter date. Original jurisdiction in the District Court was invoked under 28 U.S.C. §§ 1337, 1361 and 5 U.S.C. §§ 701 et seq. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a United States District Court has subject matter jurisdiction, under 28 U.S.C. §§ 1337, 1361 and 5 U.S.C. §§ 701 et seq., to review the NLRB General Counsel's refusal to issue an unfair labor practice complaint, where it is alleged that the General Counsel's refusal is arbitrary, capricious, in abuse of his discretion and where the reasons stated by General Counsel for refusing to issue the complaint are in direct conflict with all previously reported Board and Court precedent which should be applied to the undisputed facts?

2. Whether the District Court has such jurisdiction when otherwise an employee would be entirely deprived

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of his employment without a hearing by the actions of his federally certified union bargaining agent which have been sanctioned by General Counsel without a hearing in violation of the guarantees of the due process clause of the Fifth Amendment of the United States Constitution?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Sections 3(d), 7, 8(a)(3) and 8(b)(2) of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. §§ 151 et seq. (hereafter "the Act"); the Administrative Procedure Act, 80 Stat. 392, 393, 5 U.S.C. §§ 701 et seq.; and statutes governing the general jurisdiction of District Courts, 62 Stat. 931, 28 U.S.C. § 1337, 76 Stat. 744, 28 U.S.C. § 1361; as well as the Fifth Amendment to the United States Constitution. These are reprinted in the pertinent parts in Appendix E, *infra*, pp. 34-37.

STATEMENT OF THE CASE

I. Braden's Employment and Discharge.

Since the District Court and Court of Appeals both ruled that Braden's complaint in the District Court must be dismissed for lack of jurisdiction, assuming the truth of the factual allegations of his District Court Complaint, the facts are not in dispute.[1]

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1. As this Court has recognized, "we must on a motion to dismiss on the pleadings, [accept] the allegations of the complaint and supporting affidavits as true." *Gardner* v. *Toilet Goods Assn.*, 387 U.S. 167, 172 (1957). "We must, of course, take the allegations of the complaint at face value for the purposes of that motion." *California Transport* v. *Trucking Unlimited*, 404 U.S. 508, 30 L.Ed.2d 642, 649 (1972). See also *Boddie* v. *Connecticut*, 401 U.S. 371 (1971).

Braden worked as a welder for Paul Mueller Company (hereafter "employer") from August 11, 1969, until his discharge on March 11, 1970. (A. 7, 10). He worked the night shift, studying for the ministry at a Bible College in the daytime. (A. 7, 60). The union[2] had a collective bargaining agreement with the employer covering the unit in which Braden worked. Such agreement contained a union shop clause.[3] The employer and union are subject to NLRB jurisdiction. (A. 6-7).

On October 28, 1969, Braden paid $44 to the union to pay his union initiation fee and at least three months dues in advance. (A. 8). Braden was never given a copy of the collective bargaining agreement (A. 7), was never invited to a union meeting, was never initiated into formal union membership status,[4] was never invited to join the union or take the oath of membership in the union. (A. 8). He never received any statement or notice of any sort that any further dues or fees should be paid to the union (A. 8), until March 4, 1970, at about 10 a.m., when he received a telephone call from the union business agent. (A. 7). The business agent informed Braden he

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2. Local 146, Sheet Metal Workers' International Association, AFL-CIO.

3. This clause purported to require employees in the bargaining unit to join and pay dues and fees to the union within 30 days of employment.

4. The constitution of the union, under Art. 16, Sec. 3(a), provides in part: "After an applicant has paid his initiation fee in full he shall be notified to appear at the meeting of the local union to take the obligation of membership, at which time he shall complete the standard official form of application in the presence of two members, acknowledging that he has been furnished with a copy of the Constitution and Ritual of this Association; that he has examined the same and willingly * * *" agreed to be bound by it by taking the oath of allegiance at the meeting. (A. 81). It is undisputed that Braden was never invited to a membership meeting or formally initiated into membership as provided by this clause. (A. 8).

was two months delinquent in his dues, he had been suspended from the union and this would result in his discharge. (A. 7, 32, 34, 64). Braden immediately offered to pay all delinquent amounts and within a few hours he delivered a $24 check together with a one-page letter offering to pay any other amounts the union might specify in order to protect his union and employment status. (A. 8-9, 26-27). This tender was made prior to Braden's work shift, and prior to any demand by the union on the employer to discharge Braden. (A. 9).

When the union agent refused to accept Braden's tender, Braden left the union office but after further consultation with an attorney attempted to telephone the union agent and then mailed the $24 check and letter to the union agent, with a second check for $15 and a second letter before going to work at his customary time. (A. 9). A copy of both checks and letters dated March 4, 1970, are attached to the District Court Complaint. (A. 9, 26-27, 28-30, 31). Braden explained in the letters that any delinquency on his part was in good faith and that he had expected some written notice from the union when additional dues should be paid. There is no contention that Braden was intentionally delinquent or that any delinquency was not in good faith on his part. (A. 10). Braden gave copies of both letters to the employer. (A. 10). Neither the union nor the employer made any written response to the two letters, and the union retained the two checks until after Braden was discharged on March 11, 1970. (A. 10).

After his discharge, Braden requested and received from the employer a service letter which clearly indicates there was no discharge request or demand by the union prior to the tenders by Braden on March 4, and further indicates that Braden had been discharged because of the

automatic suspension of his union membership under the union constitution. (A. 54).[5]

II. Proceedings Before NLRB General Counsel.

Braden's unfair labor practice charges were promptly filed against the union on March 13, 1970, and against the employer on March 19, 1970. (A. 5-6, 20-23, 23-26). On March 31, the Regional Director issued a letter dismissing the charges and refusing to issue a complaint (A. 11, 32-33) on the theory that Braden had been aware of the "dues paying procedures, and the fact that, were you to become two months behind in your dues, suspension from membership in the Union would be automatic." (A. 32).

Braden timely appealed this ruling to the General Counsel (A. 11-12, 56-85) and the General Counsel denied such appeal by letter dated November 18, 1970 (A. 34-35) which is quoted in part at note 1 of the Eighth Circuit's Decision herein, App. A. p. 25. General Counsel's letter adopted the same theory as the Regional Director, that automatic suspension of union membership was sufficient to render the discharge lawful under prior Board precedent[6] even though Braden's claim that the

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5. The union constitution provides under Art. 16, Sec. 10: "Any member who becomes two (2) months in arrears shall be recorded suspended by the local financial secretary and by the General Secretary-Treasurer without notice and under no circumstances shall any extension of time be granted. No back dues shall be accepted from any member suspended in accordance with this Section and no official receipt shall be issued to record such dues after the expiration of the two (2) month limit or predated to avoid suspension * * *." (A. 82).

6. General Counsel held that Braden "did not attempt to pay his dues until after he had been advised of his suspension from membership. Braden's tender of dues thereafter could not prevent the lawful invocation of the valid union security clause. *General Motors, Packard Electric Division,* 134 NLRB 1107." (A. 34-35).

(Continued on following page)

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union had not personally notified him of any delinquency before March 4 at which time he promptly tendered all amounts due before any discharge demand by the union on the employer was not contradicted by the findings of the Regional Director or General Counsel.

Footnote continued—

The one case cited by General Counsel does not support his position, as is shown by the Board's decision in *Machinists, Missile and Electronic Dist. Lodge 508 (Lockheed Missiles and Space Co.)*, 190 NLRB No. 22, 77 LRRM 1075 (1971), which holds that an employee who was suspended from union membership automatically, but who thereafter tendered all delinquent dues before the union had made any demand for the company to discharge him could not be lawfully discharged upon such subsequent union demand. See facts summarized at note 11, *Infra*. The *Lockheed* decision is applicable here since it is undisputed that Braden promptly tendered all delinquent amounts on March 4, before any demand for his discharge. (A. 9). Moreover, the Board's decisions, as approved by the courts, hold that before a union may make a *lawful* discharge demand for dues delinquency, the union must fulfill its fiduciary duties to the employee involved by personally notifying him of his delinquency, the exact amount he should pay before a certain date, and by giving him a reasonable opportunity to correct the delinquency before the discharge request is made. See note 13, infra. The case on which General Counsel relied is inapplicable by its own language unless the dues tender is made after the union's "lawful" discharge demand, and certainly no such demand was or could have been made by the union here before Braden's March 4 tender which was made immediately upon his first notice of delinquency.

General Counsel does not find that Braden was discharged on March 11 for dues delinquency. He was not delinquent in dues on that date, but was merely found to have been suspended from union membership. In concluding that the suspension from union membership was sufficient grounds standing alone to uphold Braden's discharge, General Counsel violates the rule in the *Lockheed* case, *supra*, but also that stated by the Board in *Union Starch*, 87 NLRB 779 (1949) which first interpreted the union security provisos of the Act in such manner as to forbid discharges for lack of formal union membership. The *Union Starch* rule that formal union membership status is not required by union shop contracts under the Act is directly violated by the General Counsel's finding here, although it has been consistently followed by the Board and Courts in all reported cases. See *NLRB* v. *General Motors Corp.*, 373 U.S. 734, 742 (note 10) (1963) and *Boilermakers Local 749* v. *NLRB*, 466 F.2d 343 (D.C. Cir. 1972), and the "long-established array of authority" cited in the latter case.

Braden requested reconsideration citing subsequent Board decisions in his favor in letters dated November 27 (A. 36), December 1 and 15 (A. 40), and on January 22, 1971, General Counsel remanded the case to the Regional Director. (A. 43). During such remand, Braden filed a supplemental appeal (A. 13, 88) outlining the inconsistency of the dismissal order with the most recent Board precedent. Although Braden made repeated inquiries as to the status of his appeal (A. 11-14) and offered to assist the further investigation in any way possible (A. 44-45, 47-51) and cited subsequent Board cases in his favor (A. 52-54), the only replies he received were another letter from General Counsel dated June 18, 1971 (A. 46) advising the case had been remanded again, and a letter from Regional Director dated July 1, 1971 (A. 55) indicating the matter was "currently under investigation and we will advise you further as soon as possible."

No further word had been received by Braden from the Regional Director or General Counsel by the time Braden filed his Complaint in the District Court on September 2, 1971 (A. 2) approximately 18 months after filing his unfair labor practice charges. Finally, on September 14, 1971, after the defendants had been served with that complaint, the General Counsel denied the request for reconsideration by letter, without citation of any Board or Court precedent.

III. District Court and Court of Appeals Proceedings.

Braden's Complaint in the District Court invoked jurisdiction under 28 U.S.C. §§ 1337 and 1361 and 5 U.S.C. §§ 701 et seq. seeking to compel agency action unlawfully withheld or unreasonably delayed and to require the defendants to consider the merits of Braden's charges in the

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light of the controlling construction of Sections 8(b)(2) and 8(a)(3) of the Act. (A. 2-3, 18-19). Braden alleged the District Court "has jurisdiction to compel such action by defendants where the undisputed facts show that the non-action by Defendants is arbitrary or capricious, unreasonably delayed, or results from Defendants' misinterpretation of the Federal statute involved as applied to the undisputed facts involved. See *Southern California District Council of Laborers* v. *Ordman*, 318 F.Supp. 633, 75 LRRM 2380 (C.D. Calif. 1970), and cases cited therein." (A. 3-4).

The Complaint also raised questions under the Fifth Amendment. (A. 3).

On December 28, 1971, the District Court ruled it had no jurisdiction of the subject matter (App. D, pp. 31-33; A. 134-136).[7] The District Court relied on Section 3(d) of the Act as conferring absolute discretion on the General Counsel to refuse to issue complaints, and on 5 U.S.C. § 701(a)(2) which provides that the Administrative Procedure Act applies "except to the extent that * * * agency action is committed to agency discretion by law." It held, in effect, that it could not consider the merits of Braden's factual or legal contentions, or even the contentions that the General Counsel had abused his discretion, misinterpreted the provisions of the Act and refused to issue the complaint for unlawful reasons.

On appeal, the United States Court of Appeals for the Eighth Circuit affirmed the dismissal. However, the

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7. Defendants filed their motion to dismiss on November 4, 1971. (A. 103). Since defendants had alternatively moved for summary judgment (A. 103) Braden filed detailed interrogatories (A. 123-132) and requests for admissions (A. 111-123) but the District Court ordered that defendants would not be required to respond to same. (A. 133).

Eighth Circuit's decision overlooked the narrow holding of the District Court, and the fact that the allegations of the complaint must be accepted as true for purposes of this appeal,[8] and included comments which, if viewed without knowledge of the record herein, might be viewed as making factual findings adverse to Braden's complaint in the District Court although Braden was never given opportunity for a hearing on the merits. The Eighth Circuit's decision quotes at footnote 1 thereof certain portions of the General Counsel's letter denying Braden's appeal, but overlooks the fact that the General Counsel's *stated reasons* for denying the appeal are erroneous statements of the applicable law as interpreted by the Board and Courts in several particulars discussed in note 6, *supra,* and further discussed *infra,* notes 11-15. The Eighth Circuit's decision also states that the Regional Director and General Counsel "made a careful investigation of the facts" which is contrary to the record, since the record shows that in fact the General Counsel failed to consider several material points of fact and law which are undisputed and which show that Braden's discharge was unlawful. Finally, the Eighth Circuit, despite the fact that defendants had delayed the consideration of Braden's charges and appeal for some 18 months, held that no jurisdiction existed to review the General Counsel's decision on the theory that otherwise Board processes would be slowed down. The Eighth Circuit overlooked the fact that, for Braden, Board processes have been stopped completely, and he sought to invoke the District Court's jurisdiction to require those processes to be conducted in accordance with the applicable law and not arbitrarily and capriciously denied to him. In place of the due process guarantees of the Fifth Amendment the Eighth Circuit

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8. See Note 1, *supra.*

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substitutes the concept of expediency, to let the General Counsel obliterate the rights of charging parties by refusing to issue complaints without good reason or for unlawful reasons based upon misinterpretation of the Act and for reasons which are in conflict with Board and Court precedent.

REASONS FOR GRANTING THE WRIT

1. The Eighth Circuit's decision, in holding that a United States District Court has no jurisdiction to prevent a federal administrative agency from arbitrarily and capriciously abusing its discretion and no jurisdiction to review and correct an erroneous construction of a federal statute or an erroneous application of previous agency and Court precedent, is in conflict with this Court's construction of the Administrative Procedure Act. See *Barlow* v. *Collins*, 397 U.S. 159 (1970); *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967); *City of Chicago* v. *United States*, 396 U.S. 162 (1960). These cases, and others, indicate repeatedly that the "generous" review provisions of the Administrative Procedure Act are to be read "hospitably" to carry out Congress' broad conception that complaints should be heard against federal agency officials charged with disregarding the responsibilities delegated to them.

In refusing to require the District Court to decide the questions of law and the questions of statutory interpretation presented by Braden's complaint, the Eighth Circuit's decision violates the express provisions of 5 U.S.C. § 706 (2)(A) which command that the reviewing court "shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and

applicability of the terms of an agency action" and "shall * * * hold unlawful and set aside agency action, findings, and conclusions found to be * * * arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The District Court had found these statutory commands inapplicable on the theory that Section 3(d) of the Act committed such questions to the *unlimited* discretion of the General Counsel, relying on 5 U.S.C. § 706(a)(2) which provides that the above review provisions apply "except to the extent that * * * agency action is committed to agency discretion by law."[9] But Section 3(d) does not expressly or impliedly preclude *the District Courts* from exercising the review powers conferred under the Administrative Procedure Act. Section 3(d) merely provides that the General Counsel has "final authority, *on behalf of the Board*" with respect to investigating charges and issuing complaints. It does not provide that an employee whose right to continued employment has been infringed in a manner inconsistent with all reported Board and Court precedent, but whose rights the General Counsel fails to protect for arbitrary and capricious reasons based upon a refusal to apply prior established precedents, must be thrown out of Court no matter how meritorious his charges against the General Counsel when he seeks relief from his arbitrary treatment.

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9. Such theory, however, overlooks the well settled principle stated in *Bell Lines, Inc.* v. *United States*, 306 F.Supp. 209, 213 (D. W. Va. 1969), affirmed 397 U.S. 818 (1970): "Agency action committed to agency discretion contemplates and implies a lawful exercise of discretion. Agency action which is arbitrary and capricious abuses discretion and constitutes an unlawful exercise of discretion. Our system of jurisprudence cannot tolerate such action. The judiciary must fairly assume that the legislative branch did not contemplate such excesses and abuses and, in the enactment of the pertinent statutes at various times, omitted language clearly defining the rights of judicial review here considered and the extent and scope thereof. * * *"

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Congress did not include in the National Labor Relations Act itself any provisions for review of the General Counsel's actions here in question. But since Congress did not expressly preclude such review, the question "becomes whether nonreviewability can be fairly inferred." *Barlow* v. *Collins*, 397 U.S. pages 165-166. Preclusion of judicial review is not lightly to be inferred. "Indeed, judicial review of such administrative action is the rule, and nonreviewability an exception which must be demonstrated." *Id.*, page 166. It is "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent that the courts should restrict access to judicial review." *Id.*, page 167. "The right of judicial review is ordinarily inferred where congressional intent to protect the interests of the class of which the plaintiff is a member can be found; in such cases, unless members of the protected class may have judicial review * * * statutory objectives might not be realized." *Id.*, page 167.

Braden, as an employee covered by the Act, is obviously in the class which Congress intended to protect under Section 7 of the Act from being deprived of a livelihood by anti-union or pro-union discrimination. General Counsel is an official of a federal agency as defined under 5 U.S.C. § 701(b)(1), and there is no dispute that his refusing to issue a complaint is "final" as defined under 5 U.S.C. § 704, and therefore reviewable from the standpoint that Braden is "adversely affected or aggrieved" by such action as meant under 5 U.S.C. § 702. It would be absurd to presume that Congress by granting General Counsel some discretion meant to exclude Courts from considering whether he has *abused* that discretion. Congress in fact commands the District Courts to review and set aside agency action which is "arbitrary, capricious, an abuse of

discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). It is only "to the extent that" discretion is given that the agency is free from review under 5 U.S.C. § 701(a)(2), and as held by *Bell Lines, Inc.*, quoted at note 9, *supra*, Courts should never presume that Congress has delegated more than "a lawful exercise of discretion." See also *Scanwell Laboratories, Inc.* v. *Shaffer*, 424 F.2d 859, 874 (D.C. Cir. 1970); *Gaston* v. *Finch*, 312 F.Supp. 1327, 1329 (E.D. Ky. 1970). Our system of jurisprudence cannot tolerate such arbitrary and capricious action by federal agencies, and the courts presume that unless Congress has expressly declared to the contrary such agency action may be reviewed and corrected by the judiciary under the general statutes concerning review of federal agency actions where the specific statute in question has no review provisions of its own. The legislative history of the Administrative Procedure Act indicates that federal agencies were not intended by Congress "in any case to act blindly or arbitrarily." "It must not be an arbitrary discretion. It must be a judicial discretion; it must be a discretion based on sound reasoning." See comments of the two principal sponsors, Walter and McCarran, S.Doc. No. 248, 79th Cong., at 368-69, 310-11; Berger, *Administrative Arbitrariness and Judicial Review*, 65 Colum. L. Rev. 55, 62, 64 (1965).

The lower courts failed entirely to apply the careful analysis which should be applied under the previous rulings of this Court in the cases cited. Under such analysis it is submitted that Braden's District Court complaint was within the District Court's jurisdiction, because otherwise the General Counsel would be empowered to wrongfully, arbitrarily and capriciously obliterate important rights—

including the right to a livelihood—created by Congress for the class of which Braden is a member.[10]

2. In deciding that the District Court had no power to review the action of the General Counsel in refusing to issue an unfair labor practice complaint, even though such decision was based upon unlawful reasons and was in direct conflict with applicable Board and Court interpretations of the Act, the Eighth Circuit erroneously decided an important question of federal law which has not been, but should be, settled by this Court. See note 2 of dissenting opinion by Mr. Justice Douglas in *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 305 (1971).

This Court has long ago recognized that if the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress has created, there is a strong inference that Congress intended the statutory provisions governing the general jurisdiction of the federal courts, such as 28 U.S.C. §§ 1337, 1361, to control. *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, 300 (1943). The test was not met in the *Switchmen's* case but was in *Leedom* v. *Kyne*, 358 U.S. 184 (1958), because the employees involved in the latter case had no place else to go to correct the obliteration of their statutory rights by the Board. See also *Templeton* v. *Dixie Color Printing Co.*, 444 F.2d 1064 (5th Cir. 1971), where the

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10. From his study of the Administrative Procedure Act, its history, and the law generally, Professor Berger concludes that the Board's refusal to process an unfair labor practice charge, if arbitrary and capricious, should be considered subject to review in order to prevent Congress' objectives under the Act from being completely nullified by arbitrary and capricious denial of recourse by the agency created by Congress to protect those rights. See Berger, op.cit., 65 Colum. L. Rev. at page 69. That conclusion is consistent with a proper analysis of the question under the guiding principles of *Barlow* v. *Collins*, *supra*; *Abbott Laboratories* v. *Gardner*, *supra*, and the other cases we have cited, which the lower courts erroneously failed to apply or follow in this case.

NLRB General Counsel was held to have unlawfully exceeded his delegated authority by refusing to permit employees to have a decertification election although they had met the statutory prerequisites, and *Southern California District Council* v. *Ordman,* 318 F.Supp. 633 (C.D. Calif. 1970), where the District Court reviewed the reasons given by the General Counsel for refusing to issue a complaint based upon his interpretation of the statute of limitations contained in the Act and found that such reason was an erroneous construction of the Act and must be set aside.

Braden's rights under Section 7 of the Act, as well as under Sections 8(a)(3) and 8(b)(2), have been violated according to the previous decisions by the Board and Courts for several reasons: (1) He tendered all dues which were claimed to be delinquent after his automatic suspension of union membership and did so before any discharge demand by the union upon his employer. In precisely that situation the Board has held, in *Machinists, Missile and Electronic District Lodge 508 (Lockheed Missiles and Space Co.)*, 190 NLRB No. 22, 77 LRRM 1075 (1971), the discharge is unlawful.[11] Despite this precedent the General Counsel ruled: "Braden's tender of dues thereafter ('after

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11. Employee Katen had previously been a member of the union. His union warned him in writing on June 17 that his membership would be suspended by June 30 for three months delinquency in dues. Katen's dues were not received by the union within that time, and on June 30 the employer was so notified. When Katen offered to pay the dues on July 1 the union agent stated he could not accept them after the membership had been suspended. The Trial Examiner held (77 LRRM page 1078) that the tender by Katen on July 1, although too late to prevent the union from suspending Katen's formal union membership status, was timely to prevent the union from thereafter insisting that Katen's "job tenure" be adversely affected. Such decision was affirmed by the Board and the General Counsel unlawfully refused to recognize this point of law in ruling, in Braden's case, that Braden could be lawfully discharged merely because of his automatic suspension of union membership, even though Braden had indisputably tendered his dues before any discharge demand. **(A. 9).**

he had been advised of his suspension from membership') could not prevent the lawful invocation of the valid union security clause."[12] (2) Braden was entitled to be treated fairly by his union agent who had a non-delegable duty of advising him clearly of the exact amount of his delinquency, of the fact he should pay it by a certain date or his job would be in jeopardy, and the union had the duty to give Braden a reasonable opportunity after such notice to correct the delinquency before insisting upon his discharge.[13] Contrary to the General Counsel's assumptions, this union duty is not fulfilled by what the employer, some employee or a general bulletin board notice might have provided. *Judson Steel Corp.*, 192 NLRB No. 148 (1971); *Bulk Transport, Inc.*, 186 NLRB No. 47 (1970); *Aerojet-General Corp.*, note 13, *supra*. The union's duty applied to Braden even if he were already a union member, as he was still entitled to be advised of all requirements for retaining his employment after his dues delinquency arose. *Conductron Corp.*, 183 NLRB No. 54 (1970). Since Braden promptly tendered all delinquent amounts within hours after he was first notified of such delinquency, these precedents hold that he could not thereafter be lawfully dis-

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12. See quote at note 1, Eighth Circuit's decision, where General Counsel improperly relies upon *General Motors, Packard Electric Div.*, 134 NLRB 1107, for the quoted statement. General Counsel overlooked entirely the *Lockheed* case, involving the facts summarized at note 11 hereof concerning employee Katen's discharge, and the fact that the *Lockheed* case distinguished *General Motors* and held its principle inapplicable to the facts found by the General Counsel here. See also *Conductron Corp.*, 183 NLRB No. 54, 76 LRRM 1862 (1970), and note 6, *supra*.

13. *Granite City Steel Co.*, 169 NLRB No. 144, 67 LRRM 1399 (1968); *Aerojet-General Corp.*, 186 NLRB No. 77 (text at note 1 thereof) (1970); *NLRB* v. *Hotel, Motel and Club Employees' Union Local 568*, 320 F.2d 254, 258 (3rd Cir. 1963); *IUE, Frigidaire Local 801* v. *NLRB*, 307 F.2d 679, 683 (D.C. Cir. 1962), cert. den. 371 U.S. 936; *Restatement of Agency* 2d § 381.

charged.[14] (3) Braden could not be lawfully discharged merely because of lack of formal union membership. *NLRB* v. *General Motors Corp.*, 373 U.S. 734, 742 (1963); *Boilermakers Local 749* v. *NLRB*, 466 F.2d 343 (D.C. Cir. 1972). The thrust of the statutory scheme "is to permit the enforcement of union security clauses, by dismissal from employment, *only for failure to pay dues.*" *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 284 (1971) (Emphasis added). See also note 6, *supra*. The General Counsel did not find that Braden was discharged for delinquency of dues but held that he was discharged for loss of formal union membership status. That holding is directly contrary to the above precedent, as well as the Board's holding in the *Lockheed* case, 190 NLRB No. 22, *supra*. (4) Braden's right to continued employment without discharge is also established in the record for other reasons.[15]

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14. The *General Motors* case on which General Counsel relied (see notes 6 and 12 *supra*) holds that a belated tender of dues after a "lawful" discharge demand by the union on the employer is not timely to prevent the discharge, but the foregoing cases hold that under the facts involved in Braden's case the union could not have made a "lawful" discharge demand before March 4, the day the union first notified Braden of his delinquency, since Braden promptly tendered payment of all delinquent amounts that very day. Moreover, where the employer discharges a delinquent employee without a discharge demand having been made by the union, the employer has been held by the Board to have assumed the union's fiduciary duty of giving the employee reasonable notice and opportunity to correct delinquency before the discharge. *McDowell Mfg. Co.*, 198 NLRB No. 187, 81 LRRM 1107 (1972). Braden's discharge was obviously unlawful here, in view of the undisputed fact that Braden tendered all amounts before any discharge demand. (A. 9).

15. *United Nuclear Corp.* v. *NLRB*, 340 F.2d 133, 58 LRRM 2211 (1st Cir. 1965) holds that formal union membership status is governed by the prerequisites in the union constitution. This union's constitution, quoted at note 4, *supra*, specifically requires that to become a member the applicant must personally appear by invitation at a union meeting and take the oath of membership, which was not done here since Braden was never invited to any meeting. (A. 8). Since the union had failed to accept Braden into membership after he applied, the union *waived* any further obliga-

(Continued on following page)

3. The Eighth Circuit's decision is in conflict with decisions by other courts of appeals which have construed 28 U.S.C. § 1361. See *Ashe* v. *McNamara*, 355 F.2d 277 (1st Cir. 1965); *National Ass'n of Government Emp.* v. *White*, 418 F.2d 1126 (D.C.Cir. 1969); *Feleciano* v. *Laird*, 426 F.2d 424 (2d Cir. 1970); *Peoples* v. *United States Department of Agriculture*, 427 F.2d 561, 564 (D.C. Cir. 1970). See also *Murray* v. *Vaughn*, 300 F.Supp. 688, 696-697 (D.R.I. 1967). Although these decisions involve other

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Footnote continued—

tions of Braden under the union shop clause. *Ironworkers Local 377 (Richard J. Bettencourt)*, 189 NLRB No. 14 (1971); *Zoe Chemical Co.*, 160 NLRB No. 76, 63 LRRM 1052 (1966); *Masonry Builders, Inc.*, 160 NLRB No. 139, 63 LRRM 1204 (1966).

Under established precedent, the union waived Braden's prior delinquency by receiving and retaining Braden's tender from March 5 to March 11, 1970, before finally demanding Braden's discharge. *NLRB* v. *Woodworkers of America*, 264 F.2d 649 (9th Cir. 1959), cert. den. 361 U.S. 816; *Colgate-Palmolive Co.*, 138 NLRB No. 108, 51 LRRM 1176 (1962).

Section 14(b) of the Act makes Missouri law the determining factor of whether or not union security provisions may be entered into or enforced as to Braden's employment in Missouri. *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U.S. 525, 23 LRRM 2199 (1949); *A.F. of L.* v. *American Sash & Door Co.*, 335 U.S. 538, 23 LRRM 2204 (1949); *NLRB* v. *General Motors Corp.*, 373 U.S. 734, 53 LRRM 2313 (1963); *Local 1625, Retail Clerks International Association* v. *Schermerhorn*, 373 U.S. 746, 53 LRRM 2318 (1963), on reargument 375 U.S. 96, 54 LRRM 2612 (1963). The Missouri Supreme Court has construed the same provisions as now exist under Art. I, Sec. 2, Missouri Constitution of 1945, as creating a "right to labor" holding that "it must be considered as axiomatic that *no one* has the legal right, *by any means*, to deprive a person of the right to labor for whomsoever he will with the consent of such other * * *". *Cheek* v. *Prudential Ins. Co.*, 192 S.W. 393 (Mo. 1917). (Emphasis added). The United States Supreme Court has recognized the *Cheek* case represents Missouri's public policy that the employers in Missouri have no lawful right "to enter into a combination or agreement, the effect of which was to take from them the right to employ whomsoever they deemed proper and at the same time deprive former employees of their constitutional right to seek employment." Missouri's policy announced by its Supreme Court to this effect is as valid as a statute would be. *Prudential Ins. Co.* v. *Cheek*, 259 U.S. 530, 547-548 (1922). The lower courts should have required the General Counsel to follow or distinguish these cases before upholding the present union shop contract.

federal agencies, there is no reason for concluding that General Counsel is any less bound by the constitutional requirements of due process, or by the applicable Board and Court precedent construing the Act in question.

4. The Eighth Circuit's decision, in permitting the arbitrary and capricious action of General Counsel to completely cut off Braden's rights to continued employment under Section 7 of the Act and to cut off any recourse by Braden under the provisions of the Act *without a hearing* raises grave questions under the due process clause of the Fifth Amendment of the United States Constitution. This is precisely the problem which was foreseen by the dissenting opinion of Mr. Justice White (in which he was joined by the Chief Justice and Mr. Justice Blackmun) in *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 330 (1971).[16] In that case the majority opinion held that an employee who had unsuccessfully sought to get the NLRB General Counsel to remedy his allegedly wrongful discharge under a union shop situation could not thereafter obtain redress against the union in state court because the matter was within the exclusive jurisdiction of the

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16. Mr. Justice White there stated: "Finally, it must be mentioned that in precluding the aggrieved party from a hearing we are following a particularly disfavored course. The importance in our jurisprudence of the opportunity for a hearing need not be reviewed, but at the very least it teaches that where persons with otherwise justiciable claims cannot obtain a hearing under the law, the law is subject to close scrutiny to discover the circumstances compelling this result. * * * Certainly neither the evidence of congressional intent nor the presumed but overdrawn interest in uniformity is adequate to justify denial of a hearing.

"Most cases concerning the hearing requirement are those where some adverse consequence is visited upon the individual unless he can explain his side of the story, *Bell* v. *Burson*, 402 U.S. 535 (1971), or where there is continuing conflict and dissatisfaction with no tribunal available to fashion relief. Cf. *Boddie* v. *Connecticut*, 401 U.S. 371 (1971). The problems seems similar to those facing us here. * * * Cf. *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969)."

NLRB. Mr. Justice Douglas' separate dissenting opinion, 403 U.S. page 305 (note 2) indicates that this court has not yet settled the question of "the reviewability of the refusal of the General Counsel to act" in such situations, and suggests "that route might be open". Braden submits that the present case presents squarely the questions foreseen by the four dissenting members of the Court in *Lockridge*. The result reached in *Lockridge* shows that Braden may be completely denied a hearing unless judicial review in the District Court is available.

The teachings of this Court in *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), and cases there cited, are that our government cannot participate in the taking of our liberties or properties without first according us a hearing meeting the requirements of due process of the law, except in rare emergency situations. Braden's employment rights come within the "liberty" and "property" concepts of the Fifth Amendment. *United States* v. *Robel*, 389 U.S. 258, 264 (note 11) (1967); *Greene* v. *McElroy*, 360 U.S. 474, 492 (1959). Certainly, there is no emergency justifying deprivation of Braden's rights without a hearing. He is accused of being late in tendering dues to his union in a situation where the union concededly did not forewarn him of his delinquency and of the fact that this might result in his discharge. The union did not give him a reasonable opportunity to tender those dues, but insisted on his discharge after rejecting his full tender. It would indeed be anomolous to conclude that this situation was such an emergency as to justify denial of a hearing to Braden, and that the employment of a communist in a defense plant is not. See *United States* v. *Robel*, *supra*; *Greene* v. *McElroy*, *supra*. Braden's right to a hearing before his federally guaranteed rights of employment under Section 7 are deprived is surely as important as the rights which

were found protected by the due process clause in *Sherbert* v. *Verner*, 374 U.S. 398 (1963) (unemployment compensation payments); *Slochower* v. *Bd. of Higher Education*, 350 U.S. 551 (1956) (right to continued public employment); *Speiser* v. *Randall*, 357 U.S. 513 (1958) (right to tax exemption); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) (right to receive welfare benefits); *Bell* v. *Burson*, 402 U.S. 535 (1971) (privileges of operating a motor vehicle after having accident without insurance as required by state statutes) and *Fuentes* v. *Shevin*, 407 U.S. 67 (1972) (right to retain possession of property on which owner has signed security agreement with provisions for repossession by sheriff in case of default, even though such default has allegedly occurred).

The Eighth Circuit's decision seeks to dispense with the guarantee of a hearing to Braden on the grounds that such hearing requirement might slow down Board processes. But see note 16, *supra*. We do not contend that a hearing should be required in every case where the General Counsel refuses to issue a complaint. Such broad holding is unnecessary here. But we do contend that Braden's complaint in the District Court, which must be assumed true for purposes of the present case (see note 1, *supra*) shows that under all previously established Board and Court precedents his discharge was a violation of the Act, and the General Counsel's refusal to issue a complaint on his behalf was for reasons which are erroneous as a matter of law. In such circumstances this Court should hold that the due process clause of the Fifth Amendment requires that the District Court grant Braden a hearing on his complaint at which the Court can determine whether or not the General Counsel's refusal to act was for reasons that are justified under the applicable Board and Court precedent. The District Court should be com-

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pelled to exercise its jurisdiction of Braden's complaint, under 28 U.S.C. §§ 1337, 1361 and 5 U.S.C. §§ 701 et seq., and to grant whatever relief is called for within the power conferred under 5 U.S.C. § 706 (2)(A).

If Section 3(d) be construed as did the Eighth Circuit as precluding such judicial review, then to that extent Section 3(d) should be ruled to violate the substantive and procedural guarantees of the Fifth Amendment. *Boddie* v. *Connecticut*, 401 U.S. 371 (1971). Congress could not constitutionally have provided for the taking away of Braden's right to employment under the circumstances of this case, and its enactments should be interpreted as intending no such constitutional deprivation. *Greene* v. *McElroy*, 360 U.S. 474 (1959).

CONCLUSION

Braden respectfully urges that the petition for a writ of certiorari be granted for the reasons above set forth.

Respectfully submitted,

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Attorneys for Petitioner,
James E. Braden, Jr.

January, 1973

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 72-1054

James E. Braden, Jr., Appellant,

v.

Irving M. Herman, Director of General Counsel's Office of Appeals, National Labor Relations Board; Peter Nash, General Counsel, NLRB; Thomas C. Hendrix, Regional Director, 17th Region NLRB; Harry Irwig, Regional Attorney, 17th Region NLRB; and Max Hochanadel, Their Agent, Appellees.

} Appeal from the United States District Court for the Western District of Missouri.

Submitted: September 15, 1972.
Filed: October 5, 1972.

Before MATTHES, Chief Judge, LAY and HEANEY, Circuit Judges.

PER CURIAM.

James E. Braden, Jr., appeals from a District Court order dismissing his complaint for lack of jurisdiction.

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Braden sought to compel the General Counsel of the National Labor Relations Board and other Board officials to reconsider the dismissal of two unfair labor practice charges filed by him, and to issue a complaint based on the charges.

The unfair labor practice charge arose out of Braden's discharge by his employer at the request of Local 146, Sheet Metal Workers International Association, AFL-CIO. Braden alleged that the discharge violated the National Labor Relations Act, 29 U.S.C. §151, *et seq.* The Regional Director of the Board investigated the charge, and dismissed it on the grounds that the discharge was for nonpayment of Union dues and was made pursuant to a valid Union security clause. Braden's subsequent appeal to the General Counsel of the Board was denied. Braden requested the General Counsel to reconsider the denial. Following further investigation by the Regional Director, this request was denied as was a second motion for reconsideration.[1]

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1. The General Counsel stated:
"* * * The evidence revealed that Braden's discharge was pursuant to lawful union security provisions following his suspension from membership as a result of his dues arrearages for a two-month period.

"Although Braden contended that the Union had been deficient in its duty to advise him of his dues obligations, the evidence showed that at the time of hire Braden had been informed of his dues obligations, and that two notices were posted at the plant advising employees that suspension from membership would result from dues arrearages of two months. Indeed, Braden conceded that he was aware of his arrearage in late February, but did not attempt to pay his dues until after he had been advised of his suspension from membership. Braden's tender of dues thereafter could not prevent the lawful invocation of the valid union security clause. *General Motors, Packard Electric Division*, 134 NLRB 1107. Finally the assertion on appeal that Braden had no dues obligations since he had never been formally initiated into the union was deemed without merit, since there was no evidence that the Union did not consider him a member, nor did it seek to deny him benefits of membership."

We affirm the decision of the District Court. Section 3(d) of the National Labor Relations Act gives the General Counsel authority over the investigation and issuance of unfair labor practices. Most courts have held that federal courts ordinarily have no jurisdiction to review the General Counsel's exercise of this authority.[2] We agree with the general rule, and find no reason to depart from it in this case.[3] The Regional Director and the General Counsel made a careful investigation of the facts and determined that under the evidence and the law, there was no violation.

On appeal, Braden contends that the failure of the Board to hold a trial-type hearing violated his rights under the Due Process Clause of the Fifth Amendment. We do not agree. There are sound reasons for sustaining the right of the Board officials to act without such a hearing. The remedies of the Act are designed to protect public as well as private rights, and their invocation has been entrusted to the public agency created by Congress. See, *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261 (1940). An informal procedure to quickly resolve most cases is essential if these public and private

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2. *Terminal Freight Cooperative Ass'n* v. *N.L.R.B.*, 447 F.2d 1099, 1102 (3rd Cir. 1971); *Balanyi* v. *Local 1031, Internat'l Bro. of Electrical Wkrs.*, 374 F.2d 723 (7th Cir. 1967); *United Elec. Contractor's Ass'n* v. *Ordman*, 366 F.2d 776 (2nd Cir. 1966), *cert. denied*, 385 U.S. 1026 (1967); *Wellington Mill Division, West Point Mfg. Co.* v. *N.L.R.B.*, 330 F.2d 579, 590 (4th Cir.), *cert. denied*, 379 U.S. 882 (1964); *Division 1267, Amal. Ass'n of Street, El. Ry., Emp.* v. *Ordman*, 320 F.2d 729 (D.C. Cir. 1963); *N.L.R.B.* v. *Lewis*, 310 F.2d 364, 366 (7th Cir. 1962); *Dunn* v. *Retail Clerks International Ass'n, AFL-CIO*, 307 F.2d 285 (6th Cir. 1962); *General Drivers, Etc.* v. *National Labor Relations Bd.*, 179 F.2d 492, 494 (10th Cir. 1950); *Lincourt* v. *N.L.R.B.*, 170 F.2d 306, 307 (1st Cir. 1948).

3. L. Jaffee, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION, 360-361 (1965).

rights are to be protected. Indeed, the principal criticism of the Board is that it moves too slowly once it reaches the hearing stage of a matter. Requiring a trial-type hearing whenever a charging party disagrees with the decision of the Board officials would further complicate the Board's task of maintaining industrial peace and protecting employee and employer rights and would not serve the public interest. See, *Josue N. Saez* v. *Eugene G. Goslee, etc.*, No. 72-1014 (1st Cir. June 21, 1972).

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

Judgment

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 72-1054.

September Term, 1972

James E. Braden, Jr.,
Appellant,

vs.

Irving M. Herman, Director of General Counsel's Office of Appeals, NLRB; Peter Nash, General Counsel, NLRB; Thomas C. Hendrix, Regional Director, Seventeenth Region, NLRB; Harry Irwig, Regional Attorney, Seventeenth Region, NLRB; and Max Hochanadel, their agent,
Appellees.

APPEAL FROM the United States District Court for the Western District of Missouri.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Missouri and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said Dis-

trict Court, in this cause, be, and the same is hereby, affirmed.

October 5, 1972

Costs taxed in favor of the Appellees:

Cost of printing 25 copies of Appellees' brief:	$244.55
Costs taxed in favor of Appellees for recovery from Appellant in the U. S. District Court.	$244.55

A true copy.

Attest:

/s/ Robert C. Tucker
Clerk, U.S. Court of Appeals,
8th Circuit.
by W. F. Gruininger
Chief Deputy

November 24, 1972

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 72-1054.

September Term, 1972

James E. Braden, Jr.,
Appellant,
vs.
Irving M. Herman, Director of General Counsel's Office of Appeals, NLRB, et al,
Appellees.

Appeal from the United States District Court for the Western District of Missouri.

The Court having considered petition for rehearing en banc filed by counsel for appellant and, being fully advised in the premises, it is now here ordered that the petition for rehearing en banc be, and it is hereby denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is now here ordered that the petition for rehearing also be, and it is hereby, denied.

November 1, 1972

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

JAMES E. BRADEN, JR.,
Plaintiff,
vs.
IRVING M. HERMAN, et al.,
Defendants.

Civil Action
No. 2784

Order of Dismissal

Plaintiff seeks mandamus against the General Counsel, Regional Attorney, Regional Director, and Director of General Counsel's Office of Appeals, all officials of the National Labor Relations Board. The defendants have filed a motion to dismiss for lack of jurisdiction, and a motion for summary judgment.

The complaint charges that the plaintiff filed unfair labor practice charges against both his employer and his union bargaining agent; after investigation, the Regional Director refused to issue a complaint, but granted plaintiff the right to appeal to the General Counsel of the NLRB; an appeal was timely taken; the appeal was denied; a motion for reconsideration was considered and both charges were remanded to the Regional Director's Office for further investigation. At the time of the filing of the complaint the motion for reconsideration had not been ruled, but, according to exhibits attached to defendants' motions, the plaintiff's motion for reconsideration was denied on September 14, 1971, and a second motion for reconsideration was denied on October 20, 1971.

The defendants have filed a motion to dismiss the complaint or, in the alternative, for summary judgment in their favor.

The sole question presented on this motion is whether this Court has jurisdiction to review the refusal of the General Counsel to issue a complaint for an alleged unfair labor practice.

Section 3(d) of the National Labor Relations Act states that "the General Counsel of the Board * * * shall have final authority on behalf of the Board, in respect of the investigation of charges and issuance of complaints under Section 10 * * *."

Section 701(a)(2) of Title 5, U.S.C. (Administrative Procedure Act) states:

> "This chapter applies, according to the provisions thereof, except to the extent that * * * (2) agency action is committed to agency discretion by law."

There is an unbroken line of decisions in the Courts of Appeals stating that the refusal by the National Labor Relations Board to issue a complaint is an exercise of discretion which is not reviewable by the courts, either under the Administrative Procedure Act, the Declaratory Judgment Act, or general equity jurisdiction. *Mayer* v. *Ordman*, 391 F. 2d 889 (6 Cir. 1968). Many other decisions from other circuits announcing the same rule are cited in defendants' brief.

The landmark case of *Vaca* v. *Sipes*, 386 U.S. 171 (1967) was certainly premised on the statement in the opinion that "The Board's General Counsel has unreviewable discretion to issue an unfair labor practice complaint." (l.c. 182)

Some doubt is cast upon the proposition that the Supreme Court has directly ruled upon this question by a footnote in Justice Douglas's dissenting opinion in the late case of *Motor Coach Employees* v. *Lockridge,* 403 U.S. 274 (1971). This footnote states:

> "Since we have yet to rule on the reviewability of the refusal of the General Counsel to act, that route might be open although at present the authority is to the contrary."

It appears possible, from the above statement, that the Supreme Court might some day impose upon the District Courts the duty of reviewing all refusals of the General Counsel of the N.L.R.B. to file a complaint. However, until the day arrives "at present the authority is to the contrary."

It is therefore

ORDERED that the plaintiff's complaint is hereby dismissed, without prejudice, for lack of jurisdiction.

/s/ Wm. R. Collinson
District Judge

APPENDIX E

The relevant portions of the following statutory and constitutional provisions are as follows:

NATIONAL LABOR RELATIONS ACT, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. §§ 151 et seq.

Section 3(d), 29 U.S.C. 153(d): "* * * The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10 [§ 160 of this title], and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law. * * *"

Section 7, 29 U,S.C. § 157: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [§ 158(a)(3) of this title]."

Section 8(a)(3), 29 U.S.C. § 158(a)(3): "(a) It shall be an unfair labor practice for an employer —* * * (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage, or discourage membership in any labor organization: *Provided*, That nothing in this Act * * * shall preclude an employer from making an agreement with a labor organization * * * to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later * * *: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;"

Section 8(b)(2), 29 U.S.C. § 158(b)(2): "(b) It shall be an unfair labor practice for a labor organization or its agents— * * * (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;"

ADMINISTRATIVE PROCEDURE ACT, 80 Stat. 392, 393, 5 U.S.C. §§ 701 et seq.

5 U.S.C. § 701: "(a) This chapter applies, according to the provisions thereof, except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law."

5 U.S.C. § 706: "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency section. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."

STATUTES CONCERNING ORIGINAL JURISDICTION OF DISTRICT COURTS, 62 Stat. 931, 28 U.S.C. § 1337, and 76 Stat. 744, 28 U.S.C. § 1361.

28 U.S.C. § 1337: "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

28 U.S.C. § 1361: "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

UNITED STATES CONSTITUTION, FIFTH AMENDMENT

"No person shall be * * * deprived of life, liberty, or property without due process of law * * *".

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1014

JAMES E. BRADEN, JR., PETITIONER

v.

IRVING M. HERMAN, DIRECTOR OF GENERAL COUNSEL'S OFFICE OF APPEALS, NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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1. In August 1969, petitioner James Braden began working at the Paul Mueller Company, which had a collective bargaining agreement with Local 146, Sheet Metal Workers' International Union, AFL-CIO, containing a valid union security provision requiring its employees to tender periodic dues and initiation fees to the Union as a condition of continued employment (A. 6-7).[1] In March 1970, Braden filed unfair labor practice charges with the Board's Regional Director alleging that the Union had violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act by causing the Company to discharge him

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[1] "A." refers to the appendix filed in the court of appeals, a copy of which has been lodged with this Court.

for reasons other than his failure to tender periodic dues and initiation fees, and that the Company had violated Section 8(a)(1) and (3) by acquiescing in the Union's demand (A. 20-25). Following an investigation of the charges which revealed that Braden knew of the Union's dues paying procedures and that the consequence of falling two months behind in dues was automatic suspension from Union membership, the Regional Director concluded that Braden's employment had been terminated pursuant to a valid union security provision in the contract between the Company and the Union, and therefore declined to issue a complaint on the charges (A. 32-33).

Braden's appeal from this ruling to the General Counsel of the Board was denied on the ground that Braden's discharge was pursuant to lawful union security provisions, following his suspension from membership as a result of his dues arrearages for a two-month period. The General Counsel found that Braden had been informed of his dues obligations when he was hired, that notices had been posted at the plant advising employees that suspension from membership would result from dues arrearages of two months, and that Braden had conceded that he was aware of his arrearage in late February, before the Union had requested his discharge (A. 34-35).

Braden thereupon moved for reconsideration of the denial of the appeal (A. 36-39). Following a remand to the Regional Director for an additional investigation (A. 43-44), the General Counsel denied Braden's motion for reconsideration (App., *infra,* pp. 7-9). The General Counsel concluded that, since Braden had actual notice of his Union obligations and of the consequences of his failure to fulfill those obligations, the Union was not required to give Braden further notice of his delinquency before requesting his discharge. The General Counsel also con-

cluded that the Union's retention for about one week of the checks tendered by Braden for his past dues did not bar the Union from seeking Braden's discharge, since "* * * these checks were not sent until after the request for discharge and their retention was solely for the purpose of enabling the Union to make inquiry as to its legal position" (App., *infra,* p. 8).[2] Braden's second motion for reconsideration was also denied by the General Counsel (A. 104-105).

Braden filed suit in the district court to compel the General Counsel to issue a complaint based on his charges (A. 18-19). Pursuant to the Board's motion, the district court dismissed the complaint for lack of jurisdiction over the subject matter (Pet. App. 31-33). The court of appeals affirmed (Pet. App. 24-27). The court of appeals endorsed the general rule that "courts ordinarily have no jurisdiction to review the General Counsel's exercise of [his] authority" to issue complaints, and found no reason to depart from it in this case since both the Regional Director and the General Counsel had carefully investigated the facts and determined that there was no violation of the National Labor Relations Act (Pet. App. 26).

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[2] On the morning of March 4, 1970, union business agent Merritt telephoned Braden at his home and advised him that he was two months delinquent in payment of his Union dues and that therefore he had been suspended from Union membership and would lose his job with the Company. Later that morning, the Union advised the Company of Braden's delinquency and requested his discharge. Still later that day, Braden sent the Union a letter enclosing two checks, one for the dues arrearage and the other covering a reinstatement fee of $15. The Union returned the checks to Braden on March 11, when, in accordance with its policy of investigating a member's contentions before insisting that the Company effectuate a discharge request, it notified the Company to act on its March 4 request (A. 7, 9, 10, 64-65).

2. Section 3(d) of the Act, 29 U.S.C. 153(d), provides that "[t]he General Counsel of the Board * * * shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under Section 10 * * *." Under the uniform judicial interpretation of Section 3(d), federal courts have no jurisdiction to review the General Counsel's refusal to issue a complaint. *Saez* v. *Goslee*, 463 F. 2d 214 (C.A. 1), certiorari denied, November 20, 1972, No. 72-440. See also *Vaca* v. *Sipes*, 386 U.S. 171, 182, and cases cited by the court of appeals (Pet. App. 26, n. 2). Petitioner's attempts to avoid this settled rule are not well founded.

a. Petitioner contends that the General Counsel's decision not to issue a complaint "was based upon unlawful reasons and was in direct conflict with applicable Board and Court interpretations of the Act" (Pet. 15). This contention is based on the assumptions that the Union failed to carry out its duty of advising petitioner of his obligation under the union security provision, that petitioner tendered all monies which were claimed to be owed before the Union made a discharge demand upon the Company, and that the Union demanded petitioner's discharge, not because of dues delinquency, but because of his loss of formal union membership (Pet. 16-18). As pointed out above, however, the facts revealed by the General Counsel's extensive investigation show that petitioner was well aware of his obligation under the union security provision and of his delinquency before the Union requested his discharge, that the Union's discharge request was made before, not after, petitioner tendered the full amount of his past dues, and that the discharge was requested solely because of such delinquency. In these circumstances, the General Counsel's conclusion that peti-

tioner's discharge did not violate the Act was fully in accord with applicable Board and court decisions.[3]

b. Contrary to petitioner's further contention (Pet. 20-22). there is no constitutional requirement that the General Counsel afford him a hearing before deciding not to issue a complaint on petitioner's charges. The procedures followed by the General Counsel in this and

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[3] The cases relied on by petitioner (Pet. 17) are factually distinguishable. In *Granite City Steel Co.*, 169 NLRB 1009, 1011, the employee was never notified of his obligation to join the union, nor was he informed of the amount of dues owed or to whom it should be paid. *Judson Steel Corp.*, 192 NLRB No. 148, 78 LRRM 1137, 1138-1139, involved a new employee who was never informed of his dues-paying obligation despite an attempt to secure such information at the union hall; moreover, he worked 7 months without being challenged for arrearages despite a requirement that he join the union after 8 days of employment. The employee involved in *Conductron Corp.*, 183 NLRB No. 54, 76 LRRM 1862, was never informed of the union's complicated provision regarding maintenance of membership while on lay-off status, and the union failed to follow its normal practice of sending a delinquency notice prior to requesting his discharge. *Aerojet-General Corp.*, 186 NLRB No. 77, 75 LRRM 1337, 1338, involved an employee with over 13 years' tenure who had worked over 7 years without paying dues, and he was discharged without advance warning of his obligation. The employee in *Bulk Transport, Inc.*, 186 NLRB No. 47, 75 LRRM 1463, only knew there was a union in the plant which he could join, but was not informed of his obligation to do so (TXD, p. 4). In *IUE, Frigidaire, Local 801* v. *National Labor Relations Board*, 307 F. 2d 679 (C.A.D.C.), certiorari denied, 371 U.S. 936, the delinquent employee had not been informed of the nature of his obligation under a new collective bargaining agreement. And, in *National Labor Relations Board* v. *Hotel Employees' Union, Local 568*, 320 F. 2d 254, 256-258 (C.A. 3), neither employee had been informed of the amount of his dues obligation, although both employees had attempted to ascertain the amount from the union.

In *Machinists, District Lodge 508 (Lockheed Missiles and Space Co.)*, 190 NLRB No. 22, 77 LRRM 1075, 1076-1078 (Pet. 16), unlike here, the employee tendered the full amount of his dues delinquency *before* the union requested his discharge.

other cases fully meet the requirements of due process. See *Saez* v. *Goslee, supra.*

The remedies of the National Labor Relations Act protect public interests rather than merely private rights. *Amalgamated Workers* v. *Edison Co.*, 309 U.S. 261, 264-265. The General Counsel issues an unfair labor practice complaint only when he believes such action will effectuate the policies of the Act. Moreover, the General Counsel's determination not to issue a complaint is not a formal adjudication, but is similar to the decision of a prosecuting attorney whether to institute criminal proceedings—a decision usually made on the basis of an informal fact-finding investigation. Finally, as the court below noted (Pet. App. 27), "[r]equiring a trial-type hearing whenever a charging party disagrees with the decision of the Board officials would further complicate the Board's task of maintaining industrial peace and protecting employee and employer rights and would not serve the public interest."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

MARCH 1973.

APPENDIX

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

Washington, D.C. 20570

September 14, 1971

Re: Paul Mueller Company
Case No. 17-CA-4242

Local 146, Sheet Metal Workers' Intl. Assn., AFL-CIO
(Paul Mueller Co.)
Case No. 17-CB-761

Donald W. Jones, Esq.
Church, Prewitt, Jones,
Wilson & Karchmer
110 Landmark Building
309 North Jefferson
Springfield, Missouri 65806

Dear Mr. Jones:

Your motion for reconsideration has been duly considered.

The motion is denied. Nothing was presented in the motion which warranted departure from our original decision. Contrary to your contention, none of the cases cited establishes that an employee with actual knowledge of his Union obligations and of the consequences of his failure to fulfill those obligations must be given further notice by the Union prior to a request for discharge in order to make that request for discharge lawful. In every case cited, the employee in question either lacked actual knowledge as to some significant element of his financial obligations or as to the consequences of failure to meet them, or special circumstances existed

which reasonably cast doubt or uncertainty on such knowledge which he had acquired.

In contrast, Braden knew what his Union obligations were and what the consequences would be if he failed to meet them because he was told by the Company when he was hired. He knew the amount of monthly dues and the extent of his arrearage because he had a recent receipt which would provide that information. He also knew that he had to make payment at the Union hall because he had been told by the night steward in February 1970, when he asked about the procedure for payment. Since Braden had actual knowledge of his Union obligations and the consequences of failure to perform them, the Union was under no duty to remind him of these facts prior to the request for his discharge.

Moreover, under all the circumstances, the Union's retention for about one week of the checks sent by Braden prior to returning them to him could not be deemed to constitute an acceptance of the proffered payment or a waiver of the right to request Braden's discharge, inasmuch as these checks were not sent until after the request for discharge and their retention was solely for the purpose of enabling the Union to make inquiry as to its legal position.

As to the contention that Braden was never initiated into the Union, the evidence established that, in accordance with the provisions of Article 16, Section 3(a), of the Union's contribution, Braden completed the standard form of application, subscribed to the obligation of membership, made the appropriate payments, and was thus duly inducted into membership.

Since Braden knew what his membership obligations were and what the consequences would be if he failed

to meet them, the fact that he did not have a copy of the collective bargaining agreement or the Union's constitution prior to the request for his discharge has no bearing on the matter. Finally, the evidence failed to establish that Braden was treated differently from other employees in similar circumstances.

Inasmuch as the Union's request for Braden's discharge was therefore lawful the Company's acquiescence to that request was also lawful.

Accordingly, we have no alternative but to adhere to our original decision in this case.

SINCERELY YOURS,

PETER G. NASH
General Counsel

IRVING M. HERMAN
Director, Office of Appeals

cc: Director, Region 17
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